

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ARGONAUT INSURANCE COMPANY	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 97-4636
	:	
I.E., INC., John W. Orem and Paul Hopkins,	:	
Defendants.	:	

MEMORANDUM

Presently pending are Defendant Hopkins' Motion for Summary Judgment, his Motion to Strike Plaintiffs' Sur-Reply, and the respective responses in opposition thereto. For the reasons set forth below, Defendants' motions will be denied.

Factual Background

Defendant I.E., Inc. ("I.E."), a company wholly owned by Defendant Orem, was involved in the temporary and long term leasing of employees to its clients. Defendant Hopkins was an independent contractor-officer of I.E.. In December, 1995, Defendant Hopkins orally solicited plaintiff for the purposes of procuring a workers' compensation insurance policy to cover the leased employees. Plaintiff subsequently issued an insurance policy, and later several sub-policies, for the requested coverage. Plaintiff alleges that Defendant Hopkins misrepresented I.E.'s incorporation status, qualifications to do business in New Jersey, and the nature of its operations regarding employee leasing. Plaintiff's cause of action against Defendant Hopkins asserts a claim for fraud in the inducement in the issuance of the insurance policy and seeks payment for the increased premiums due and owing once the policy was properly adjusted to reflect the appropriate risk plaintiff undertook. Defendant Hopkins moved for summary judgment asserting that he made no material misrepresentations which induced plaintiff to issue the insurance policy. Conversely, plaintiff maintains that its underwriter, Ms. Provasnik, relied on his statements made at the time of oral application for coverage. Plaintiff maintains that Defendant Hopkins alleged representation that I.E. was primarily involved in the

business of providing temporary employees as opposed to employee leasing was material to its evaluation of I.E. as a potential insured.

Discussion

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is inappropriate, however, where a dispute regarding a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. See Celotex Corp. v. Catrett, 477 U.S. 316, 323 (1986), 106 S.Ct. 2548, 2552 (1986).

Viewing the evidence in the light most favorable to plaintiff, a genuine issue of material fact exists regarding the representations allegedly made by Defendant Hopkins at the time of application for coverage. The parties dispute whether Defendant Hopkins correctly described I.E.'s business operations as a long term temporary employment agency or as employee leasing. See generally, Hopkins Certification, Provasnik Aff.. Defendant Hopkins maintains that no such dispute really exists, and also argues that even if it does, summary judgment is warranted because the alleged misrepresentation was not material in inducing plaintiff to provide I.E. with the requested coverage. Defendant Hopkins' assertion is directly contrary to plaintiff's position. In her affidavit, Ms. Provasnik states that "...had [Defendant Hopkins] informed me that I.E. was in fact an employee leasing business rather than a long term temporary agency, the Argonaut policy would not have been underwritten and issued."

Provasnik Aff. at ¶ 17. The contradictions in the statements of Defendant Hopkins and Ms. Provasnik cannot be resolved as a matter of law. The determination as to whether any misrepresentation was made and the materiality of such is a question of fact properly decided by a jury.

Defendant also moved for an Order Striking Plaintiff's Sur-Reply asserting that the sur-reply was not timely filed and that neither the Federal Rules of Civil Procedure nor the Local Rules of Court permit plaintiff to file such. Despite Defendant Hopkins assertions to the contrary, this court does not determine nor issue "return dates" for motions. According to the Local Rule of Civil Procedure 7.1(c), parties have 14 days within which to reply to a properly served motion. There are no federal nor local rules regarding the filing of additional replies nor sur-replies once a response to the original motion has been filed; rather it is entirely within the Court's discretion as to whether replies and sur-replies will be considered. Neither plaintiff nor defendant provided this Court with additional facts nor legal arguments in their respective replies. It is therefore not necessary to strike the sur-reply. Accordingly, Defendant's Motion to Strike Plaintiff's Sur-reply will also be denied.

An appropriate order follows.

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ORDER

AND NOW this 17th day of March, 1999, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is DENIED. IT IS FURTHER ORDERED that Defendant's Motion to Strike Plaintiff's Sur-reply is DENIED.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.